SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1901.

THE KOKOMO FENCE MACHINE COMPANY, Petitioner,
vs.
ALVA L. KITSELMAN ET AL., Respondents.
No. 389.

RESPONDENT'S REPLY TO MOTION FOR STAY.

Respondents submit:

First. That the motion for stay fails to show any adequate cause for the intervention of this court.

Second. That it fails to show any cause for staying the account or for disturbing the order of the circuit court overruling the motion for stay.

Third. That it affirmatively appears from the motion, and still more fully from the affidavit for respondents herein filed, that the circumstances are such as to make it improper to grant a stay, and that the order of the circuit court denying it is right.

The accounting relates to acts of infringement which (as shown in the accompanying affidavit) the petitioner (the defendant below) claims to have discontinued nearly two years ago. Its officers have testified, in the proceedings before the master, that it went out of business and practically ceased to exist in the spring of 1900, more than a year before the decision of the court of appeals herein. It is claiming that during the period of infringement it made no profits. It was incorporated shortly before the suit was commenced with a trifling capital for the express purpose of manufacturing infringing machines, its

promotors having evidently resorted to incorporation under Indiana laws for the purpose of seeking to escape individual responsibility. The bill charged and the proofs in the original record showed these facts, but the circuit court, when the mandate came down, dismissed the bill as to all the officers and stockholders, holding that, even under these circumstances they could not be held either for the purpose of injunction or account. This ruling is in direct conflict with decisions in this and other circuits, but compels complainant to complete the account and appeal from the final decree to this effect before it can obtain relief. Meanwhile every delay in the account affords the defunct corporation opportunity to dissipate whatever assets it may have and increases the difficulty of following them, or of such proceedings as may be necessary to enforce satisfaction of judgment.

It has been represented by the petitioner during the accounting (as shown by the accompanying affidavit) that knowledge of the material matters in controversy was confined in many particulars to one or two persons; that there was but one person sufficiently familiar with its business to make a report thereon, and that person was in ill health and temporarily out of the jurisdiction; and a considerable delay was caused by the fact that the defendant persuaded the master that no progress could be made in the absence of this one individual. The accounts are scattered and disappearing. Every delay increases the difficulty of obtaining evidence concerning the facts involved in the account. There are pertinent questions concerning the truth of the report representing there were no profits, and the disposition made of the money received for infringing machines, whether the stockholders are liable to assessment, and other material facts which it is difficult enough to properly investigate where proceeding promptly, and concerning which important evidence is liable to disappear if there be long delay. The decision in favor of complainant constitutes *prima facie* right to this account, and it would be a proper case for the court to direct depositions taken *in perpetuam rei memoriam* if suit were not already pending.

If the petitioner thought this a proper cause for stay, application should have been made to the court of appeals (which then had control over its own decree) before or at the time the taking of testimony on the account began, not after it was under way. It should have been made before filing the petition for certiorari or when filing that petition; certainly before the return to that petition. The decree having been entered under the mandate of the court of appeals, and it being familiar with the circumstances of the case, application should have been made to it before removing the cause to this court.

The court of appeals had control of the proceedings under its decree below originally, and where the petitioner deliberately waited until

after presenting the issue of the writ of certiorari before making application to it for that purpose (though the motion shows the accounting had been proceeding both prior and subsequent to the application for this writ) it cannot expect this court to take upon itself the burden of entertaining such an application; certainly not where, as in this case, it clearly appears that there is no special hardship to the petitioner.

Where nothing has occurred since the return to the writ to require a stay; where the business which is the subject of the account has been, or is being, wound up; where the knowledge of material matters is confined to few persons, liable to scatter or die, and dependent, in part, upon documents likely to disappear, and where the motion for stay is not sustained by any showing of special hardship or prejudice, it is submitted that the motion should be overruled.

ROBERT H. PARKINSON,
Counsel for Respondents.

SUPREME COURT OF THE UNITED STATES.

October Term, 1901.

The Kokomo Fence Machine Company, *Petitioner,*
vs.
Alva L. Kitselman *et al.*, *Respondents.*
No. 389.

ALVA L. KITSELMAN, being duly sworn, deposes and says: That he is the respondent above named; was personally present at the hearing of the motion for stay on the 4th day of November, 1901, recited in the fifth paragraph of the motion for stay herein, and heard the proceedings thereon; that there was then shown in opposition to said motion, among others, the following facts which appear of record, to wit, that the Kokomo Fence Machine Company, petitioner herein, by its testimony represented that it had, prior to the entry of the decree herein, and prior to the judgment of the court of appeals, gone out of business and disposed of its assets; that some of its records material for this accounting had either disappeared or were not, at the time, to be found; that the petitioner was organized shortly before the suit commenced for the primary purpose of manufacturing the infringing machine, with knowledge of complainant's patents in suit, with a nominal capital of $6,000, represented mainly by a license under a subordinate patent, and claimed to have conveyed away its tangible property before judgment in this case; that the evidence necessary for this accounting was likely to disappear if not promptly taken; that the petitioner (defendant on the accounting) had so far failed to produce many of the material records called for in the accounting, representing that it did not know what had become of them, and that others called for and supposed to be in existence had not yet been produced because search had to be made for them; that the employees of said company were already scattered, and liable to be further scattered soon; that when complainant moved the master in August last for an order upon the defendant to report facts called for, particularly within defendants' knowledge, necessary for the accounting, it opposed such motion upon the ground that there was but one person having the necessary knowledge to make such report, that he was then physically unable to do this work and was out of the jurisdiction, and, upon the ground that such facts could not be ascer-

tained and reported without him, the master ordered the cause temporarily stayed.

Thereupon it was urged against said motion that the evidence necessary to show the material facts was likely to disappear if not promptly taken; that the defendant was suffering no prejudice, since it claimed to have gone out of business; that the death or disappearance of a material witness or destruction of records might make it impossible for the complainant to prove material facts in the case, and that there were reasons to apprehend the disappearance of such evidence. After hearing argument of both parties the court entered an order overruling the motion generally, but suspending proceedings on the accounting thirty days in order to enable the moving party to present a motion to the court of appeals.

Affiant understands no written motion or petition was presented to the court of appeals, but that an oral motion for a stay was made there within the thirty days and that the same was overruled instanter. Affiant was not present when it was argued and overruled, and has no personal knowledge of what, if any, reasons were given by the court.

It is not true, as appears to be represented in the seventh paragraph of the motion for stay, that the circuit court made any order relative thereto on the 5th of December, 1901, or at any date since the order denying the motion generally, but the petitioner having given notice that a further motion for stay would be made in the circuit court on the 5th of December, 1901, affiant was then in attendance on said court, and counsel for the petitioner orally stated to the judge, off the bench, that he desired to present such a motion; whereupon the judge intimated that he was not likely to modify his former order, stating that he was then engaged with a jury, but if parties desired to be heard on such a motion they could be later in the day. After consideration, counsel for the petitioner stated that he would not urge the motion, and no further action was taken in respect thereto.

John E. Frederick, who makes affidavit to the petition herein, was not present at this proceeding, but, on the contrary, being under order to appear before the master in this cause for testimony at Indianapolis on that day, it was represented by his counsel that he was confined by sickness to his home at Kokomo and physically unable to attend, and the proceeding before the master was adjourned on that account.

Affiant further states that the witness represented by defendant to be the only witness having knowledge of material facts herein has returned to the jurdisdiction since the order temporarily suspending proceedings herein, and affiant believes the deposition of this witness and other material witnesses and documentary evidence can be obtained if the case is permitted to proceed which it may be impossible

to obtain later, and that any order which prevented proceedings on this accounting until this cause shall be reached and disposed of in the supreme court will be likely to cause the irreparable loss of material evidence and greatly prejudice complainants below.

ALVA L. KITSELMAN.

Subscribed and sworn to before me this 11th day of January, 1902.

ROBERT MILLER,
Notary Public.

[NOTARIAL SEAL.]
Com. exp. May, 1905.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1901.

ALVA L. KITSELMAN AND DAVIS M. KITSELMAN,
Petitioners,

vs.

KOKOMO FENCE MACHINE COMPANY,
Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT; AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The cross-petition of Alva L. Kitselman and Davis M. Kitselman, respondents in the matter of the writ of certiorari granted during the present term, upon the petition of the above-mentioned Kokomo Fence Machine Company, removing to this Honorable Court from the United States circuit court of appeals for the seventh circuit a suit in equity wherein your petitioners were complainant-appellants and said Kokomo Fence Machine Company was defendant-appellee, represents and shows unto your Honors as follows:

That your petitioners having upon an appeal from a decree of the circuit court of the United States for the district of Indiana to the United States circuit court of appeals for the seventh circuit, in a suit against the above-mentioned Kokomo Fence Machine Company for infringement of four several letters patent of the United States, obtained a decision and mandate of said court of appeals, reversing the decree below and ordering a decree in favor of the complainants under the Kitselman patent there in suit, and the mandate pursuant to said decree having issued on or about the 15th day

of May, 1901, and a decree having been entered in the circuit court of the district of Indiana for an injunction and account under said letters patent, the supreme court of the United States, on the petition of said Kokomo Fence Machine Company, did issue on or about the 4th day of November, 1901, to the United States circuit court of appeals for the seventh circuit its writ of *certiorari,* commanding said court of appeals to send without delay to said supreme court the record and proceedings in said cause, so that said supreme court may act thereon as of right and according to law ought to be done; that thereafter return was made to said writ by said United States circuit court of appeals, and the record and proceedings in said cause, together with ten printed copies thereof, are now on file in this court, said cause being docketed herein as Kokomo Fence Machine Co. petitioner, *vs.* Alva L. Kitselman and Davis M. Kitselman, respondents, No. 389, October term, 1901; that on or about January 27, 1902, this Honorable Court, on further petition of said Kokomo Fence Machine Company, issued in said cause an order staying proceedings on the accounting therein pending the determination thereof; that in order that this Honorable Court may act in said cause upon the record therein as of right and according to law ought to be done, it is necessary that your petitioners be permitted to be heard upon all the issues presented by the assignments of error in said circuit court of appeals and to have such relief under each of the letters patent in suit as it shall appear they were entitled to in said court of appeals; that this suit was for infringement of four patents of the United States belonging to your petitioners, all relating to machines for weaving wire fence and under all of which your petitioners were shown by the bill of complaint and proofs to have constructed and to be constructing machines for weaving wire fence, the said inventions being embodied in the same machines; that the bill charged that the machines for weaving wire fence made, sold and used by defendants and the subject of controversy herein infringed each of said patents and complainants' exclusive rights thereunder, said patents being designated by the names of their respective inventors as the Davisson, Kitselman, Connor and Pope; that the record contained evidence in support of said charges, which, as your petitioners believe and assert, fully substantiate them and entitle your petitioners to an injunction and account under said several patents; that by the assignments of error in the petition for appeal upon which said cause was held to the United States circuit court of appeals, your petitionerss' right to such relief was duly presented to said court, as appears in the petition for appeal therein and the record now on file in said cause of Kokomo Fence Machine Company, petitioner, *vs.* Alva L. Kitselman and Davis M. Kitselman, respondents, No.

389, pp. 805-6; that said circuit court of appeals, though in its opinion recognizing the novelty and value of the invention embraced in said Davisson patent, and appearing to find it, as well as the invention of the said Kitselman patent, embodied in defendants' machines here in controversy, treated the relief given by it under the Kitselman patent as dispensing with occasion for relief under either of the other patents, and without expressing any adverse opinion concerning either of said patents, specified certain claims of said Kitselman patent as adequately embracing the invention, and its mandate had issued and the decree under said Kitselman patent had been entered in said circuit court before said Kokomo Fence Machine Company filed its before-mentioned petition for writ of *certiorari;* that your petitioners believe and assert each of said letters patent to be good and valid, the title therein to have been duly vested in complainants throughout the period of the infringement complained of and ever since, that each of said letters patent and your petitioners' exclusive rights thereunder were infringed by defendants in the manufacture, sale and use of the machines complained of which were adjudged an infringement of said Kitselman patent, as aforesaid, and that the same fully appears by the record herein removed to and filed in this Honorable Court, pursuant to its said writ; that the question of your petitioners' right to relief under each of said letters patent against said infringement are so involved in the issues and evidence brought here for review upon the aforesaid writ of *certiorari* issued in behalf of said Kokomo Fence Machine Company that each of said patents and the effect thereof must be examined in determining the right to relief in said cause now pending in this Honorable Court upon the writ issued in response to the aforesaid petition of the Kokomo Fence Machine Company; that justice to your petitioners requires that if it should thereupon appear to this Honorable Court that relief should have been granted them under either or all of said letters patent, it should be adjudged accordingly; that your petitioners believe that through error of law said circuit court of appeals failed to give them all the relief to which they were entitled upon the record, under the assignments of error presented in said court, and that such error was due partly, at least, to the fact that said court regarded the relief awarded under the said Kitselman patent as rendering it unnecessary to determine the questions presented under other patents; that your petitioners are, as they verily believe, upon the record thus removed to this Honorable Court, entitled to the relief prayed under said several letters patent, including such relief as the said circuit court of appeals has failed to award them; and that the relief prayed by your pe-

titioners under each of said letters patent, and to which it verily believes it is entitled upon the aforesaid record, in addition to the relief granted, is of great value and importance.

Your petitioners further respectfully submit that the said United States circuit court of appeals erred:

First. In failing to find and adjudge that the Davisson patent here in suit was good and valid and the property of complainants; that said Kokomo Fence Machine Company had infringed complainants' exclusive rights thereunder, and particularly the second and third claims thereof, and to grant complainants an account of profits and damages thereunder.

Second. In failing to find and adjudge that the Connor patent here in suit was good and valid and the property of complainants; that said Kokomo Fence Machine Company had infringed complainants' exclusive rights thereunder, and particularly the second and third claims thereof, and to grant complainants an injunction and account of profits and damages thereunder.

Third. In failing to find and adjudge that the Pope patent here in suit was good and valid, and the property of complainants; that said Kokomo Fence Machine Company had infringed complainants' exclusive rights thereunder, and particularly the first, ninth and tenth claims thereof, and to grant complainants an injunction and account of profits and damages thereunder.

Fourth. In failing to find and adjudge that the complainants' exclusive rights under each of the patents set forth in the bill had been infringed by the defendants, and to grant an injunction and account of profits and damages thereunder against the defendants and each of them.

Wherefore, in order that the writ of *certiorari* heretofore issued by this Honorable Court upon the petition of Kokomo Fence Machine Company may be fully effective to enable this court to do full justice to all parties herein and that your petitioners may have the full benefit of all relief to which they may appear to have been entitled in said cause, your petitioners pray that this Honorable Court will grant them a writ of *certiorari* requiring said cause and the record thereof to be certified to it by the United States circuit court of appeals for the seventh circuit for its review and determination pursuant to the statute in such cases made and provided, and that your petitioners may have therein such relief as they may be entitled to in respect to all the issues presented by the assignments of error in the said circuit court of appeals, and that for the purposes of this petition and of all further proceedings they may have the benefit of the record and printed transcripts now on file in this Honorable Court in said cause No. 389, and that the return to the writ therein

may be treated as a return to the writ herein prayed; and for such other and further relief in the premises as may be meet.

STATE OF INDIANA,
COUNTY OF DELAWARE. } ss.

Alva L. Kitselman and Davis M. Kitselman, the above-named petitioners, being duly sworn, say that they have read the foregoing petition subscribed by them and know the contents thereof, and that the same is true in substance and matter of fact, as they verily believe.

ALVA L. KITSELMAN,
DAVIS M. KITSELMAN.

Subscribed and sworn to before me this first day of March, 1902.

ROBERT MILLER,
[SEAL.] Notary Public.

I hereby certify that the foregoing-stated grounds in support of the petition for writ of *certiorari* in the above-entitled cause are, in my opinion, well founded in point of law.

ROBERT H. PARKINSON,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

The writ of *certiorari* issued in behalf of the Kokomo Fence Machine Company has brought to this court the entire record of the case referred to herein, for review. This petition is filed in order to remove any technical objection that might arise to the granting of such relief to the petitioners herein as may upon the review of the cause seem to this court to be due them. The question of infringement under the several patents upon which suit was brought all relates to the same machine, the contention of camploinants having been throughout that the defendant's machine has followed the plan of the complainants in respect to each of the four patents embodied therein, disguising the infringement by formal changes. The court of appeals seems to have regarded the Kitselman patent as so completely covering the defendant's machine that it was unnecessary for it to look further. If that question is to be reopened, it involves an examination of all the patents in suit, for they are so united in the machines and in the testimony concerning the machines that no fair determination of the issues raised in the case (whether relating to the Kitselman patent or to others) can be made without considering and determining the effect of each. The Kokomo Fence Machine Company having procured the transfer of the cause to this court, it would be a grave injustice to the present petitioners to exclude them from the right to whatever relief they shall appear to be entitled to upon the record as presented in the circuit court of appeals. The effect of granting this cross-petition is simply to insure to the respective parties the same advantages and mutuality upon the hearing in this court as they were entitled to upon the hearing which this court is to review. Such rights should be incident to the removal of the cause by *certiorari* wherever the respondent to the original writ of *certiorari*, by proper proceedings, asks for affirmative relief.

Respectfully submitted,

ROBERT H. PARKINSON,
Counsel for Petitioners.

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